TESTIMONY OF

MICHAEL J. GLENNON

before the

SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS

COMMITTEE ON FOREIGN AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

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Mr. Chairman and Members of the Subcommittee:

Let me begin by thanking the Subcommittee for inviting me to be here today, and by commending the Subcommittee for its interest in the acute and recurring problem of harassment, intimidation, and surveillance of residents of the United States by agents of the intelligence services of foreign countries.

I participated in a study of that subject in the late 1970's while I was legal counsel to the Senate Foreign Relations Committee. Obviously I am unable to engage in any specific discussion of its contents here today. There is, however, a vast amount of information on the public record concerning this subject. The following testimony responds to specific questions put to me by the Subcommittee. It is largely a synopsis of an article I wrote that appeared last year in the Harvard International Law Journal. (The article is entitled "Liaison and the Law: Foreign Intelligence Agencies' Activities in the United States," and appears at 25 Harv.Int.L.J. 1 [Winter, 1984].) That article sets forth my thoughts in greater detail and also includes extensive citations to the public record. With the Chairman's permission, I would ask that that article appear at the conclusion of my remarks.

A. THE DIMENSIONS OF THE PROBLEM

Mr. Chairman, foreign intelligence agencies -- including those of Taiwan -- have conducted extensive harassment, intimidation, and surveillance of United States residents here on Amer-

ican soil. Typically, these activities are supervised by case officers operating under diplomatic cover, although some may pose as students, businessmen, or tourists. The case officers direct agents, who are "tasked" to carry out specific intelligence missions. The most frequent is surveillance, including the infiltration of groups thought to be inimical to the foreign regime, attendance at demonstrations, and similar activities directed at identifying critics of the regime. Another frequent mission is the disruption of anti-regime activities, such as speeches, demonstrations, and organizational planning.

Once the critics are identified, several things may occur. They may be threatened or assaulted. Relatives in their homeland may be harmed. Upon returning home, the critic may be imprisoned, possibly tortured. On rare occasions, he or she may be murdered here in this country.

B. THE EXISTING STATUTORY FRAMEWORK

Certain of these activities have violated three federal statutes that require the registration of foreign agents. Principal among them is the Foreign Agents Registration Act, 22 U.S.C. 611-621, which requires a person who, within the United States . . . solicits, collects, disburses, or dispenses contributions, loans, money or other things of value for or in the interest of [a] foreign principal . . . to register with the Attorney General." In addition, the so-called Notification Act, 18 U.S.C. 951, requires that non-diplomats who act within the United States as agents of a foreign government register with the Secretary of State. A third provision, 50 U.S.C. 851, requires

that certain persons who have received instructions in espionage or counterespionage register with the Attorney General. While diplomats are excepted from the requirements of each statute by their terms, persons acting on their behalf are not.

Furthermore, some of these activities appear to have violated one of the civil rights acts, 18 U.S.C. 242, which imposes criminal penalties for willfully depriving any inhabitant of the United States of his or her constitutional rights. (Resident aliens stand on essentially the same footing as citizens under the Bill of Rights.)

The United States intelligence community has known for some time that these acts have been taking place. It has made occasional protests, but these appear to have been pro forma. Notwithstanding specific knowledge of these acts, it has in some cases continued to conduct liaison relationships with the agency in question. These relationships have embraced, among other things, training programs, information-sharing, and organizational support. In some instances that support has continued. Let us be clear: the United States intelligence community has continued to advise and train some of the same foreign services that have used their newly-acquired skills to violate United States law. And United States intelligence agencies have in some instances made no real effort to ensure that the skills they have imparted are not used in the United States against residents of our country.

Mr. Chairman, I do not suggest any impropriety in liaison relationships between the United States intelligence community and foreign agencies that respect the constitutional rights of

United States residents. These relationships provide executive decision-makers with extraordinarily useful information, information not otherwise available. Our national security is materially advanced as a result.

I do suggest, however, that indifference can become acquiescence; acquiescence, consent; and consent, criminal liability as well as moral responsibility. If the United States intelligence community has not crossed that final line, it has come perilously close. And if this Subcommittee -- or any congressional committee -- is serious about getting to the bottom things, it must look carefully and purposefully at the whole gamut of relevant liaison relationships.

C. WEAKNESSES IN THE EXISTING STATUTORY FRAMEWORK

So much for the existing statutory framework. The weaknesses in that framework are evident. The registration statutes are overbroad. The Executive lacks the will to enforce them, for reasons I will discuss in a moment. And two proof problems exist: either the foreign agent must register himself, which is unlikely, or the United States intelligence community must furnish the information needed to prosecute, which could compromise sensitive intelligence sources.

Similar proof problems arise in connection with the civil rights statutes. Moreover, at least with regard to the case officers (as opposed to the agents), diplomatic immunity provides a shield.

I think the "Solarz Amendment" of 1981 was a step in the right direction, but it now appears that the Amendment has had

little effect; experience with it suggests why. First, the cut-off is optional. Arms sales are terminated only in the event the President makes the determination in question, but the Amendment does not require that he make that determination. Second, some nations engaged in these activities do not buy arms from the United States, or they can obtain the arms elsewhere. Restricting the penalty to a cut-off only in arms sales renders the statutory penalty meaningless in those situations. Third, the Amendment refers only to a "consistent pattern of harassment or intimidation," but it makes no reference to surveillance. Most offending foreign countries normally apply sanctions in their own territory -- they wait for the dissident to return home before "countering" him. Here the Amendment is irrelevant.

D. INSTITUTIONAL AND POLITICAL IMPEDIMENTS TO EFFECTIVE LAW ENFORCEMENT

A variety of political and institutional factors further impede the effective enforcement of these statutes. These become clear as the role of each executive branch actor is reviewed.

The Federal Bureau of Investigation is of course the agency primarily responsible for federal law enforcement. The Bureau has in the past made affirmative efforts to gather information only about those foreign intelligence agencies whose activities in the United States directly implicate U.S. national security. For the most part these have been the agencies of communist countries. In operational terms, this has meant that the FBI has known a great deal about the intelligence activities of countries operating against the United States government -- agencies en-

gaged in classic espionage. But it also has meant that the Bureau has known virtually nothing about most agencies operating against private persons -- agencies that conduct harassment, intimidation, or surveillance of dissidents engaged in constitutionally protected activities.

Now, one can agree or disagree with the Bureau's allocation of counterintelligence resources. My own opinion is that some measure of differentiation is appropriate. But it seems clear that the amount of resources devoted to the investigation of "friendly" foreign intelligence services by the FBI has been disproportionately small in relation to the substantial systemic harm caused by their activities. This, I think, is the first institutional impediment: passivity on the part of the FBI.

Assume, in any event, that the Bureau does obtain evidence of a specific federal offense by a foreign intelligence agency. Two principal remedies are available. If the violator is a case officer clothed in diplomatic immunity, he can be expelled. If the violator is an agent without diplomatic immunity, he can be prosecuted. Unfortunately, as a practical matter, further institutional impediments limit the availability of either remedy.

First, the Central Intelligence Agency has a strong incentive to oppose either action. In many instances intelligence agencies know the identities of each other's personnel, and any steps taken against foreign intelligence operatives in the United States can result in retaliatory action against CIA officers stationed abroad. Moreover, prosecution can risk the disclosure of sensitive intelligence sources and methods, since the question

always arises as to how the government knows the defendant is a foreign agent.

Second, relevant State Department officials too often are loathe to see any steps taken which will disrupt an otherwise smooth-running bilateral relationship. Conflict-avoidance mechanisms seem highly evolved in the diplomatic personality; by training and inclination, career foreign service officers -- to their credit -- are experts in maximizing harmony and minimizing discord. Yet that proclivity can impede a swift and firm response to actions inconsistent with diplomatic norms. Perhaps more important, it can also operate to cut short at the outset counterintelligence efforts by the FBI. And without relevant information, the propriety of either remedy obviously becomes moot.

E. METHODS OF STRENGTHENING INSTITUTIONAL MECHANISMS

What is to be done? At the risk of sounding simplistic, I must tell you that it seems clear to me that this problem can be resolved swiftly and permanently, without further legislation, if the requisite will were mustered at the highest levels of the executive branch. That will would direct the following:

First, United States intelligence and law enforcement agencies would be prohibited from encouraging foreign intelligence. agencies to engage in illegal activities in the United States. For reasons that are not clear, the executive order promulgated by President Reagan (E.O. 12,333; 46 Fed. Reg. 59,941 [1981]) dropped this prohibition; it provides simply that "[n]o agency of the Intelligence Community shall participate in or request any

person to undertake activities forbidden by this Order." In contrast, the previous executive order governing domestic intelligence operations (E.O. 12,036; 43 Fed. Reg. 3674 [1978]) provided that "[n]o agency of the Intelligence Community shall request or otherwise encourage, directly or indirectly, any person, organization, or government agency to undertake activities forbidden by this Order or by applicable law." [Emphasis added.] Obviously the previous order was much tighter. If the Administration is serious about bringing these unlawful activities to a halt, it must impose a prohibition against direct and indirect participation in and encouragement of activities that our own agencies are forbidden to conduct.

Second, if the Executive found the requisite will to resolve the problem, it would "task" the CIA, FBI, and NSA to gather intelligence actively about those foreign agencies reasonably believed to be engaged in acts of harassment, intimidation, or surveillance within the United States.

Third, foreign intelligence agencies would be placed on notice that the harassment, intimidation or surveillance of United States residents will henceforth be regarded as a breach of diplomatic norms, and that every foreign diplomat who thus acts beyond the scope of his diplomatic immunity will promptly be expelled. In response to concerns about retaliatory expulsions of CIA personnel, I would simply say that I am aware of no evidence that the Agency engages in the kinds of activities abroad that have raised legitimate concerns about foreign intelligence agencies' activities in the United States. The application of reciprocal diplomatic norms by foreign governments would

not, therefore, undercut United States intelligence activities carried out in foreign countries.

Finally, the State Department, in formulating policy towards foreign countries, would be instructed (a) to learn from the United States intelligence community precisely what foreign intelligence services are doing in this country; and (b) to take into account the extent to which those services engage in acts of harassment, intimidation, or surveillance directed at United States residents. Many of these foreign governments are human rights violators. It may be that we cannot affect the way they treat people in their own countries. But surely the United States government can affect the way they treat people here in our own country.

F. METHODS OF STRENGTHENING THE STATUTORY FRAMEWORK

Mr. Chairman, I am not optimistic that the necessary administrative steps will be taken. I must say that I am frankly bewildered at the Administration's inaction. The issue is, in the end, a law-and-order issue; there would seem few more squarely conservative objectives than that of protecting the exercise of constitutional rights from violation by foreign thugs. Nonetheless, it seems unlikely that the Executive will take the initiative, and in the absence of an effective administrative response, any solution will have to come from the Congress. I should like at this point to outline briefly the principal legislative remedies that I believe might be appropriate.

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with respect to any country that engages in the pattern of activities now described in the Amendment. This would effectively mandate a cut-off of arms sales to that country. The amendment might be further strengthened by including in the cut-off other forms of assistance, such as military and economic aid.

Second, the burden might be shifted to the Executive by providing that the cut-off will take effect unless the President determines that such a pattern of activities has not occurred. It would of course be necessary, under this procedure, to specify the country in question; given the substantial, unrebutted evidence that the activities of Taiwan intelligence services now fall within the statutory formula, it would seem appropriate that Taiwan be so specified.

Third, a statutory requirement that the President expel foreign diplomats who violate diplomatic norms would, I think, raise constitutional problems. The conduct of diplomatic relations is generally thought to be a plenary power of the President. In addition, because immunity is conferred by treaty (and possibly by customary international law as well), any statutory attempt at retrenchment could seriously complicate the conduct of United States diplomacy.

On the other hand, as members of this Subcommittee are well aware, Taiwan is not recognized by the United States, and the United States does not carry on diplomatic relations with Taiwan. Personnel affiliated with Taiwan's Coordination Council for North American Affairs (CCNAA) do enjoy "privileges and immunities" of a sort, but this is different from the immunity accorded diplo-

mats of recognized countries. The scope of CCNAA immunity is narrower, and more important for present purposes, it is conferred by the President pursuant to statutory authorization. The Taiwan Relations Act (in section 10; 22 U.S.C. 3309(c)) authorizes the President to extend privileges and immunities to the CCNAA on a reciprocal basis. That statutory provision can be modified: there is no requirement in international law that this immunity be extended, and there is no constitutional inhibition against its limitation by Congress. It would be entirely appropriate for Congress to repeal this provision of the Taiwan Relations Act; it would also be entirely appropriate for Congress to amend the provision so as to confer immunity conditionally. This Subcommittee may wish to consider, for example, engrafting the approach of the Solarz Amendment onto the Taiwan Relations Act: the Act might be amended to authorize the President to extend appropriate privileges and immunities to the CCNAA only after he has transmitted to the Congress his determination that the authorities on Taiwan are not engaged in a pattern of harassment, intimidation, or surveillance of persons in the United States. This approach would seem to have the benefit of relating the remedy more directly to the wrong.

Fourth, and finally, the Subcommittee may wish to consider a broader remedy, analogous to the "country reports" required by the human rights legislation (sections 116(d)(1) and 502b(b) of the Foreign Assistance Act of 1961). The executive branch might be required to report annually to Congress concerning every country engaged in a pattern of harassment, intimidation, or surveillance in the United States. Such reports would provide

hard information on matters now beset with rumor and speculation. Private entities that deal with these countries, such as colleges and universities, would then have a reliable factual foundation on which to base individual or collective pressure to halt their misconduct.

G. CONCLUSION

Mr. Chairman, at one level, the most painful level, the problem we have been discussing today is the problem of relatively few individuals: Henry Liu, Wen-chen Chen, their widows, their children, their families, and other emigres who dare to speak out against oppression and who have nowhere to turn but to you -- the United States Government -- when the forces of oppression seek to silence them.

On another level, however, the problem affects all Americans. For every resident of the United States is constitutionally accorded the rights of free speech, free association, and free assembly. If these rights are abridged by a foreign secret police force, it is not simply the individual "target" who is their victim -- it is our entire body politic.

For information is the lifeblood of our democracy. Our system assumes a marketplace of ideas. My liberty depends upon your rights -- to free speech, free association, free assembly -- as much as it depends upon my own. Our democracy works only if each person can learn all he needs to know to develop informed opinions and to cast intelligent votes. We need to hear what these emigres have to say. They have important messages on the terror of authoritarianism. We need to be reminded what tyranny

is all about.

So when a foreign secret police force strikes out at these brave men on American soil, it strikes at the very heart of our political system.

The murder of Henry Liu represents an attack, Mr. Chairman -- some might say a terrorist attack -- on our country and on the most precious ideals for which it stands. I hope that the Congress responds accordingly.